Angsa ak Garak (m) v Public Prosecutor

COURT OF APPEAL (SARAWAK) — CRIMINAL APPEAL NO Q-05–106 OF 2006
LOW HOP BING, ZAINUN ALI AND HASAN LAH JJCA
22 JULY 2009

Criminal Law — Murder — Appeal against conviction and sentence — Whether there was misdirection by trial judge — Penal Code s 302

Criminal Law — Murder — Defence of provocation — Burden on accused to establish provocation on balance of probabilities

The deceased, Ling Sii King was the camp manager of Zedtee Sdn Bhd ('the company'). On 28 October 2004, the deceased and the general manager of the company travelled together in a land cruiser to Serkawi Camp ('the camp'). According to the general manager, when they arrived at the camp while the deceased was unlocking the gate, he heard a loud sound that came from the back of the deceased. He then saw the deceased collapse to the ground. The general manager made his way to the deceased to check on his condition when he heard another gunshot sound coming from the same direction. At the same time he felt pain in his right and noticed that his right shoulder was bleeding. The general manager then quickly walked towards the land cruiser and drove away to Shin Yang Camp where he parked and locked the vehicle before he rang his colleague, William Madon and asked him to lodge a police report. After receiving treatment for his injuries, the general manager and Madon made their way to the Tatau Police Station to meet the investigation officer ('the IO') who was assigned to the case. After interviewing the general manager and reading the police report lodged by him, the IO and a team of police personnel proceeded to the scene of the crime and found the body of the deceased at the spot identified by the general manager. They found five gunshot wounds on the body of the deceased but did not find his wallet. A post-mortem of the deceased's body revealed that the cause of death was the gunshot wound at the back chest which had penetrated both lungs and caused bleeding in the chest. On 6 November 2004 the appellant was arrested by the IO. Among the objects seized from the appellant were a driving licence, a wallet and some foreign currency, which were later positively identified by the deceased's wife as belonging to the deceased. In the course of investigation, the IO had visited the appellant's family hut which led to the discovery of a shotgun belonging to the appellant

which had been kept hidden in a wild boar trap situated near the farm hut. A government chemist and an armourer attached to the Armoury Section were called upon as expert witnesses to clarify and confirm that the appellant's shotgun would have caused the fatal injury sustained by the deceased. The appellant stood charged for the murder of the deceased, an offence punishable under s 302 of the Penal Code. The judicial commissioner who heard the case found the appellant guilty and hence this appeal. The trial judge found that the appellant had used his shotgun to puncture the lungs of the deceased and that the use of a shotgun to inflict those injuries was indicative of an intention to kill the person on whom they were inflicted. In his appeal, the appellant submitted that the trial judge had erred in law and in fact in, inter alia, accepting the evidence of the sole eyewitness, the general manager, in toto because he was a biased witness and his evidence was not corroborated; in rejecting the defence evidence when the prosecution had failed to rebut the same.

Held, dismissing the appeal:

(1) The evidence of the general manager who was the sole eyewitness was corroborated by his police report, the evidence of the IO who had visited the scene of the crime and who did not find any *parang* or samurai sword or evidence of any struggle, the pathologist in his post-mortem report and the two other expert witnesses, ie the government chemist and the armourer. In any event, neither the evidence of the expert witnesses and the pathologist nor the procedure in arriving at their decisions were challenged by the defence in this case (see paras 52, 54 & 56).

(2) If the appellant intended to invoke private defence or provocation as his defence, he had the burden of proving that he was provoked by the deceased and the general manager prompting him to shoot the deceased. He had the burden to prove either defence on a balance of probabilities (see para 60).

(3) The findings of fact and law by the judicial commissioner accurately interpreted the cause and effect of the crime committed by the appellant. The findings of fact were consistent with the evidence before the court and the findings of law were correct. As such, there was no misdirection on the findings of fact and law (see para 64).

[Bahasa Malaysia summary

Si mati, Ling Sii King merupakan pengurus kem Zedtee Sdn Bhd ('syarikat'). Pada 28 Oktober 2004, si mati dan pengurus besar syarikat tersebut menaiki bersama kereta pacuan empat roda ke Kem Serkawi ('kem'). Menurut

pengurus besar, apabila mereka tiba di kem semasa si mati membuka pintu pagar, dia terdengar bunyi yang kuat yang datangnya daripada belakang si mati. Kemudiannya dia nampak si mati rebah ke tanah. Pengurus besar tersebut bergerak menuju ke arah si mati untuk memeriksa keadaannya apabila dia mendengar bunyi tembakan yang datangnya daripada arah yang sama. Pada masa yang sama dia terasa sakit di bahagian kanannya dan mendapati bahawa bahu kanannya berdarah. Pengurus besar tersebut berjalan dengan pantas menuju ke kereta tersebut dan memandu ke kem Shin Yang di mana dia meletakkan kenderaan dan menguncinya sebelum dia menelefon kawannya, William Madon dan memintanya membuat laporan polis. Selepas menerima rawatan untuk kecederaannya, pengurus besar tersebut dan Madon menuju ke Balai Polis Tatau untuk bertemu pegawai penyiasat (IO) yang ditugaskan untuk kes tersebut. Selepas menemu bual pengurus besar dan membaca laporan polis yang dibuat olehnya, IO dan sepasukan kakitangan polis menuju ke tempat kejadian dan menemui badan si mati di tempat yang dikenal pasti oleh pengurus besar tersebut. Mereka menemui lima luka tembakan pada badan si mati tetapi tidak dapat menemui dompetnya. Post-mortem ke atas badan si mati mendedahkan bahawa sebab kematian ialah luka tembakan pada belakang dada yang telah menembusi kedua-dua paru-paru dan menyebabkan pendarahan di dada. Pada 6 November 2004 perayu ditahan oleh IO. Antara objek-objek yang dirampas daripada perayu ialah lesen memandu, dompet dan mata wang asing, yang kemudiannya dikenal pasti secara positif oleh isteri si mati merupakan kepunyaan si mati. Semasa penyiasatan dijalankan IO tersebut telah melawat pondok keluarga perayu dan terdapat petunjuk yang mendedahkan senapang patah kepunyaan perayu disembunyikan di dalam perangkap babi hutan terletak berdekatan dengan pondok ladang. Ahli kimia kerajaan dan amra yang berkhidmat dengan Bahagian Senjata dipanggil sebagai saksi-saksi pakar untuk menjelaskan dan mengesahkan bahawa senapang patah perayu yang telah menyebabkan kecederaan yang membawa maut kepada si mati. Perayu dituduh membunuh si mati, satu kesalahan yang dihukum di bawah s 302 Kanun Keseksaan. Pesuruhjaya kehakiman yang mendengar kes tersebut mendapati perayu bersalah. Maka rayuan ini. Hakim perbicaraan mendapati bahawa perayu telah menggunakan senapang patahnya untuk menembusi paru-paru si mati dan bahawa penggunaan senapang patah yang mengakibatkan kecederaan tersebut menunjukkan niat untuk membunuh orang yang ditembak tersebut. Dalam rayuannya perayu berhujah bahawa hakim perbicaraan telah khilaf dalam undang-undang dan fakta, antara lain, dalam menerima keterangan secara keseluruhan satu-satunya saksi kejadian, pengurus besar, kerana dia merupakan saksi yang berat sebelah dan keterangannya tidak disokong; dalam menolak keterangan pihak pembelaan apabila pihak pendakwaan gagal untuk mematahkan hujah tersebut.

Diputuskan, menolak rayuan:

(1) Keterangan pengurus besar yang merupakan satu-satunya saksi kejadian disokong oleh laporan polis yang dibuatnya, keterangan IO yang melawat tempat kejadian dan tidak menemui sebarang parang atau pedang samurai atau keterangan sebarang pergelutan, ahli patologi dalam laporan post-mortemnya dan dua saksi pakar lainnya, iaitu ahli kimia kerajaan dan amra. Dalam kes ini, keterangan saksi-saksi pakar dan ahli patologi dan prosedur dalam membuat keputusan tidak dicabar oleh pihak pembelaan dalam kes ini (lihat perenggan 52, 54 & 56).

(2) Sekiranya perayu berniat untuk menggunakan pertahanan sendirian atau provokasi sebagai pembelaannya dia mempunyai beban untuk membuktikan bahawa dia telah diprovokasi oleh si mati dan pengurus besar yang menyebabkan dia menembak si mati. Dia mempunyai beban untuk membuktikan salah satu pembelaan atas imbangan kebarangkalian (lihat perenggan 60).

(3) Dapatan-dapatan fakta dan undang-undang oleh pesuruhjaya kehakiman dengan tepat mentafsirkan sebab dan akibat jenayah yang dilakukan oleh tertuduh. Dapatan-dapatan fakta konsisten dengan keterangan di mahkamah dan dapatan-dapatan undang-undang adalah betul. Oleh itu tidak terdapat salah arah dalam dapatan-dapatan fakta dan undang-undang (lihat perenggan 64).]

Notes

For a case on appeal of murder, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1154.

For a case on defence against murder, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1157.

Cases referred to

Bala anak Matik v PP [2006] 3 MLJ 516, CA (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

PP v Sainal Abidin Mading [1998] 3 CLJ 41, HC (folld)

Tan Buck Tee v PP [1961] MLJ 176, CA (folld)

Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (folld)

Wong Teck Choy v PP [2005] 4 MLJ 693, CA (refd)

Legislation referred to

Penal Code ss 300, 302

Ali Basah (Ali Basah & Partners) for the appellant.

Wong Chiang Kiat (Deputy Public Prosecutor, State Attorney General's Chambers, Sarawak) for the respondent.

Zainun Ali JCA (delivering judgment of the court):

[1] What we have before us on the appeal by the appellant against the decision of the learned judicial commissioner who found him guilty as charged.

[2] I shall lay out the charge, the facts and evidence of both the prosecution and defence cases. At the end of which it would be ascertained whether the learned judicial commissioner made the correct findings of fact and law, and whether in which, in the circumstances the appellate intervention would be necessary.

THE CHARGE

[3] The appellant, Angsa ak Garak stands charged for an offence punishable under s 302 of the Penal Code for which the charge was amended at the end of the prosecution's case as follows:

> That you, on the 28th day of October, 2007 at about 11.00 am at the border of Rosebay Plantation and Sekawi Camp, Ulu Muput, Riba, Tatau, in the District of Bintulu, in the State of Sarawak, did commit murder by causing the death of one Ling Sii King (M), and that you thereby committed an offence punishable under S 302 of the Penal Code.

FACTS OF PROSECUTION CASE

[4] According to the evidence adduced by the prosecution witnesses, PW1 Hairol bin Saman, a police constable attached to the Tatau Police Station and on duty on 28 October 2004, at about 12.25pm, he received a police report No 435/04 (P3) lodged by William Madon (PW2). PW2 lodged P2 after receiving a telephone call from Tony Cheng Min (PW5). At that time, PW2 was at his office at Zedtex in Kemena, Bintulu. PW5 informed him as stated in P3 (the police report) which is reproduced here:

> Pada 28.10.2004 jam lebih kurang pukul 1225 hrs bertempat di Pejabat Zedtree di Kemena, Bintulu, saya telah menerima panggilan telefon daripada seorang General Manager dari Kem Sg. Nuput Kiba, Tatau yang bernama Tong Chin Wing bahawa dia telah kena tembakan di sempadan konsisi Zedtee Sdn. Bhd. (Kem Pembalakan) dengan Rosby Plantation Ulu Sg Muput Kiba, Tatau. Dalam kejadian tersebut seorang Camp Manager yang bernama Ling Sii King telah mati di tempat kejadian dan Tong Chin Ming kena di dada sebelah kanan.

(The importance of this report will be discussed later). I shall revert to this report later.

A **[5]** The deceased, Ling Sii King who was also known as 'Panjang' was the camp manager of Zedtee Sdn Bhd whilst PW2 was the forest manager and PW5 was the general manager of the said company.

[6] PW5 testified that on 28 October 2004 at about 8am, he was still at his B house in Bintulu preparing to go to Serkawi Camp situated at Ulu Anap, Sg Muput, Tatau. PW5 and the deceased travelled in a four wheel drive Toyota Land Cruiser bearing registration No QMD 2119 with the deceased at the steering wheel whilst PW5 sat at the passenger. At about 11am both of them arrived at the gate of the Serkawi Camp which was closed and locked.

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[7] After stopping the vehicle about ten feet away facing the gate, the deceased alighted from the vehicle followed by PW5. The deceased then went to the gate to unlock it using the side passage of the gate crossing into Serkawi Camp side. PW5 walked up to the gate and was standing about three feet D apart from the deceased, facing him. Whilst the deceased was unlocking the gate, PW5 heard a very loud sound much like a gunshot. At the same time he said he saw and heard the deceased collapsed in slow motion on the ground on his back whilst uttering in Foochow dialect 'I will die this time' (see photograph exh P54).

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[8] According to PW5, he looked up at the forest or bushes area from where he heard the sound of the gunshot but he could not see anything, apart from bushes or forest. The sound came from the back of the deceased and on PW5's right side on the hill.

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[9] PW5 then went towards the deceased using the same circle passage used by the deceased earlier. He squatted near the deceased's head to look at the deceased's condition. He saw that the deceased's mouth was bleeding and his G head was moving to the left and right. Whilst PW5 was still squatting and looking at the deceased, he heard another gunshot sound coming from the same direction. At the same time he felt pain in his right. He saw that his shirt on his right shoulder was torn that his right shoulder was bleeding.

H **[10]** PW5 then quickly walked towards the direction of the vehicle, got into it and drove away to Shin Yang Camp at Mile 79 Bintulu-Sibu road towards Tatau direction.

[11] Before he left the deceased at the scene of crime, he did have a glance I at the direction from which sound came but still he saw nothing.

[12] At the camp he locked the vehicle and rang PW2 to lodge a police report about the incident. He also received treatment at Policlinic at Tatau with the assistance of a foreman from the camp. Thereafter, he went to Tatau

Police Station and met PW2 and C/I Zulkifli Ishak, (PW15), the IO of this case at about 1pm on the same day. Subsequently they went to the scene of the crime with a police party.

[13] According to Navin Francis a/l Susinadan (PW12), on 29 October 2004 at about 12.15am he examined PW5 according to a referral letter from a clinic in Tatau. According to PW12, PW5 sustained right shoulder wounds secondary to alleged gunshot the one which he later explained he was certain, was due to two fresh gunshot wound with a pallet. These two injuries were actually caused by entry of the bullet ie at the point of entry and the other at the point of exit. The wound below the clavicle is the entry wound because the edges of the wound entering inward and the other injury above the clavicle is the exits wound because the edges of the wound averted outward.

[14] PW15 testified that on 28 October 2004 at about 12.55pm he was informed of the shooting incident. He went to the Tatau Police Station and met PW2 and PW5 at the station. He noticed PW5 was injured on his right shoulder with blood on his torn shirt had been treated. After interviewing PW5 and reading P3, with a team of police personnel they proceeded to the scene of crime at 2.30pm. They reached at 5pm. At the scene upon examining, PW15 found the body of the deceased lying on the ground with his face upward (exhs P5J and M) motionless and dead.

[15] There were gunshot wound on the calf of the deceased's foot and four gunshot wounds on his back (exhs P5K, L, M). He also did not find deceased's wallet upon examining the deceased's pocket.

[16] PW15 also instructed PW3 to take 14 photographs (P5A–P5N) at the scene including P5F and P5N, photographs of one spent cartridges (P9) which was found two feet away from a tree which he marked 'X' in photograph P5H. According to PW15, there were bushes in the surrounding area of the tree marked 'X'.

[17] From point 'X' one could see clearly the lock of the gate and the distance was 45 feet after measurement. However, from the lock of the gate it is difficult to see anyone at the tree marked 'X' below three feet as it was covered with bushes. The sketch plan of the scene and its legend was produced and marked as P26, P27 and P27K respectively in which he marked 'A' for the draw marked 'X' earlier and 'K' for the lock at the gate. PW15 testified that he conducted a thorough search at the scene of the crime and its surrounding area but did not find any other incriminating exhibits (such as parang or samurai sword or plank).

A **[18]** PW15 then directed SM Liong Poh Kii (PW14) to escort the body of the deceased to Tatau Police Station and subsequently to the mortuary of Sibu Hospital.

B **[19]** On his way back from the scene of crime to Tatau Police Station, PW15 stopped at the camp at Miles 79 where he examined the said land cruiser QMD 2119. Although the vehicle was locked, he could see clearly inside the vehicle and did not find anything incriminating such as parang or samurai sword in it. According to PW5, he had lost the key to the said vehicle when he sought treatment at the policlinic at Tatau town.

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[20] On 2 November 2004, at about 3.30pm in the Sibu Hospital, a post mortem was conducted on the deceased's body by Dr Jamil Dolkadir (PW16) the pathologist, witnessed by PW15 while the body was identified by the deceased's wife Lee Ching (PW6). The post mortem report was marked as
D P29. In P29, PW16 stated the cause of death as bilateral haemothorax due to gunshot wound at the back chest, penetrating both lungs. In short it meant bleeding in the chest due to gunshot wounds penetrating both lungs.

E **[21]** On 6 November 2004, at about 11.45am at the express wharf at Tatau new extension town, the appellant was arrested by PW15. He also seized three bags of which one was a green colour Ricker brand (P31) containing two parangs and on its side pocket PW15 found a driving license belonging to the deceased (P12). From the body search on the appellant, PW15 found
F one Alain Delon brand wallet (P11) from his trouser's pocket. In the wallet, he found one piece of Indonesian currency note of Rupiah100,000 (P13A) and a piece of US currency US$20 (P13). The exhs P12, P11, P13A, P13B had been positively identified by PW6, the deceased's wife as belonging to the deceased. PW6 also testified when questioned by the court that the deceased
G drove home the vehicle, the land cruiser QMD 2119. When he came home he did not carry anything but he goes to work carrying spare parts for the timber camp and plantation. In their house, she does not own a samurai sword and she had not at any time, seen the deceased carrying a samurai sword in his vehicle.

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[22] The appellant was subsequently detained, arrested and produced before a magistrate to be remanded from 8 November 2006 for three days (P36) and a further extension for 11 days from 10 November 2006.

I **[23]** PW15 in his investigation had on 9 November 2004 at about 11.45am, went to a farm hut at Ulu Muput belonging to the appellant's family. Led by Garak ak Engkok (PW11) the appellant's father, he brought him to a spot in the bushes nearby the farm which was about 15 minutes walking distant PW15 discovered one single barrel 12 gauge shotgun (P7)

and a plastic bag containing ten life shotgun cartridges (P8A–H). Underneath the verandah farm hut, PW15 also found a spent shotgun cartridge (P20A). Photographs were taken on the exhibits by PW4 as P6A–N.

[24] According to PW9, Abak ak Punggok, the wife of PW11, the shotgun and the cartridges belonged to the appellant. The appellant kept it there before he left the hut. The appellant told her to inform PW11 that the shotgun and the ten cartridges were kept at the normal place.

[25] PW9 also testified the shotgun belonged to the appellant who had never hidden it in the house but had it hidden in a trap (wild boar trap). He was familiar with the place where the appellant had hidden the shotgun. This was confirmed when photographs of the said exhibit were shown to this witness.

[26] According to Sim Hang Tiew PW7, who is a government chemist, on 24 November 2004, he examined the shotgun (P7) and the ten life cartridges (P8A–H) which PW15 recovered in the bushes near the farm hut. He prepared his report and marked it as P15.

[27] PW7 testified that he tested P7 using the ten live cartridges and found it to be functioning except that six of the cartridges misfired. He compared the characteristics markings of the spent cartridge found at the hillside (P9) and the spent cartridge found underneath the verandah of the farm hut (P20A). They were to be similar to that of the cartridges he successfully tested, using P7. He was of the opinion therefore that P9 and P20A were fired using the same shotgun.

[28] PW7 further testified that P9 and P20A were of the 12 bore type consisting of nine lead pellets. P7 was also found to have gun powder residue in its barrel. Upon examining of the deceased's shirt (P21A), PW4 confilined that the cluster holes found in it are consistent with the holes caused by lead pellet from P17A; ie the pellets extracted from the deceased's body during the post mortem.

[29] Chief Inspector Zaidi Sait, PW13, an armourer attached to the Armoury Section, IPD Miri, Sarawak had on 21 February 2006 at the Shooting Range 18 Mile Bintulu-Miri conducted shooting of the shotgun (P7) using live P24. He used 45 feet range or 15 metres to shoot P7 and found P7 functioning as he managed to fire the P24 using P7 onto P25.

[30] According to PW13, if life human target at 45 is being fired by 15 bore shotgun using nine pellets cartridge and fired by an experienced long house hunter from a hillside, the victim will be hit on target.

[31] PW13 also testified that it is not possible for a man squatting at the head of the body (as in P5) to be target and shot from a 45 feet distance from the uphill position (shown on the left side of P5) for one pellet to hit the right shoulder of the squatting man and the three pellets hitting the thigh of the body as in P4F. The exhibits mentioned above were sent to the armourer during trial after the court approved the learned deputy public prosecutor's application.

[32] The pathologist, Dr Jamil bin Dolkadir @ Abdul Kadir, PW16 conducted a post mortem on the deceased. In his evidence at p 88 para 21 he reported that:

> Cause of death: Bilateral Haemothorax due to gunshot wound at the back of chest penetrating both lungs. In short bleeding in the chest due to gunshot wounds penetrating both lungs. There is no other possible cause of death apart from what he had stated earlier.

[33] Further he said that 'the pattern of the bullet tract on injuries Nos 1 to 4 are from the left chest of the body going down to the right chest as evidence the metallic pellet was recovered at the right lower chest. The tract of the pellet was slight downward from the entry wound to the spot where it was lodge. It was descending slightly. It was less than 2.5 descending. The possible position of the gunshot was from the back, left and slightly from higher position. *By looking at the wound it is not possible for the attacker to be immediately right behind the deceased because one of the pellet recovered in the right chest with the entry wound from the left*'.

[34] Further, he testified with regards to the injury No 5, that all the tracts and wounds were upward. The injuries were not inflicted simultaneously with injuries 1–4. Based on these injuries and their tract the probable position of the victim would be lying on the ground on his back with his face upward. If the gunshot came from a higher level which is less than 45 feet high, towards the direction of the legs of the body lying on the ground with face upward, the injuries would have been probable.

THE DEFENCE OF THE APPELLANT

[35] The salient facts had been well summarised by the learned judicial commissioner. This is what he said (at pp 359–363):

> The defence case
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> (33) The defence called two witnesses in the defence case, including the who opted to give his evidence on oath. The DW1, began by relating that, on 27 October 2004 he was at the farm hut. The next morning,

after taking his breakfast he went out to hunt wild boars at Nanga Tiga, his favourite hunting ground. According to him Nanga Tiga is in Ulu Sg Pelugau which is within Zedtee area. The hitched a ride in a logging lorry driven by a Bugis man to go to Nanga Tiga. Upon reaching Nanga Tiga the walked for about more than an hour to reach the hunting ground. For the hunting trip he brought along the shotgun (exh P7) which when shown by his counsel exh P7 and exh P8A to H, he said:

> It was my shotgun. I am not licensed to carry or own the shotgun. I bought the shotgun from a mechanic working with Zedtee Company name 'Ah Ngong' for RM300. There were other people who own similar type of gun like mine. I bought the ammunitions from a Chinese man name 'Ah Kee' who also work with Zedtee Company.

[36] DW1 continued his testimony in this fashion. He said that as he walked along the river in the hunting area, he heard the sounds of wild boars. He loaded the shotgun with the cartridge he had with him in his pouch and as he wanted to shoot the wild boar ran away. He chased after it but was unsuccessful. By that time it was almost noon and he felt hungry, so he went to the main road. He wanted to wait for any vehicle to pass by so that he could hitch a ride. He said he was waiting at the gate as shown in photograph exh P5J. Whilst he was waiting at the gate on Zedtee side, he heard the sound of vehicle approaching the place where he was waiting. The said at that time he placed his shotgun and his sling rattan bag on the ground and he was not holding them. He saw a land cruiser vehicle approaching from Pelugau side (the other side of the gate) and stopped on the left side of the road. He saw two men alighting from the vehicle. One of the men known to him as 'Panjang' (identified photograph of the deceased), with whom he had some quarrels before, approached him and started scolding him for being a trouble maker. Then he saw the deceased going back to the vehicle and the deceased took out a samurai sword from the vehicle and chased him. The other man known to him as 'Ah Meng' (identified as PW5) was then holding a parang and was walking behind the deceased. The testified that on seeing the deceased approaching him, he ran to the place where he had put his shotgun. He picked up the shotgun and swung it towards the deceased and pulled the trigger and shot him. He said further, that the deceased, upon seeing him holding the gun, turned and wanted to run away. He pointed in court that the distance from the deceased at that time was about 16 feet. After he fired the shotgun at the deceased, he said PW5 came forward towards him. He reloaded his shotgun and swung the shotgun and fired at PW5 to scare and chase him off. He said he saw the deceased falling onto the ground after he fired the first shot. After he fired the second shot at PW5 he saw him going back to the vehicle and left the scene. The testified that meanwhile he

A emptied the gun barrel and dropped the spent cartridge on the ground near the first spent cartridge he had dropped earlier (in exh P5J) and went home to the farm hut. He reached the farm hut at about 5.30pm that day. He said that the two shots, that were fired were not intentional, but that they were merely to chase the deceased and PW5 away from him. He claimed that Abit B (PW8) was telling a lie, since he had quarrels with PW8 previous to this incident.

[37] That night he slept at the farm hut and the next morning, he said, he C went to Bintulu and stayed at Bintulu for three nights. From Bintulu he wanted to return to the farm hut. But when he reached the express wharf at Tatau he was arrested by the police. Whilst under detention, he said he was physically assaulted by the police and he said he was produced in court only on the sixth day after his arrest. He denied that all the items produced in D court as exhibits (exhs P31, P12, P11 and P13A & B) were seized from him. He said all these exhibits were never in his possession. He claimed that the police planted them including the cartridge at point 'X' (exh P9).

[38] Under cross-examination, he said that it took him 12 hours walk to E reach the gate in photograph exh P5J from the farm hut. He is very familiar with the area in exh P5J which is surrounded by primary jungle and was uninhabited. The area is at the far end of Ulu Muput with two routes for access to Serkawi Camp, one passes by the farm hut from the river and the other by road from Bintulu. The denied firing the two shots from the hill F marked 'X' in photograph exh P5J. He denied that the shotgun exh P7, the life cartridges exh P8A–H and the expended cartridges exh P9 and exh P20A were his. Referring to photograph exh P5J he said that the road was flat on both sides of the gate for about 50–100 meters (judging from the distance described by in court). (During this time I noticed that the refused to answer G questions by learned deputy public prosecutor and appears to be angry when shown photographs of the scene and when a particular line of questioning were employed). In his evidence the described the deceased as a person of bad character who frequently rebuked his workers. He also takes 'syabu' (a type of dangerous drugs). He said he is not angry with the deceased and happy with H the deceased's offer of RM5 per tonnage of timber log extracted from his family land (pulaus).

[39] Under re-examination the said he knew the deceased and PW5 normally pass this gate to go to Serkawi Camp but claimed that they did not I have the key to unlock the gate since 'Sii Ting' and 'La Lee' used to open the gate for those who wish to go through with their vehicles. He said he had previously shot a pack of wild boars and had killed more than one and that on the day he shot the deceased and PW5 it was in the same manner. He said he did not aim when he fired the two shots. As for the assault by the police

on him, he claimed that he did not know how to go about lodging a police report on the incident although he had been arrested before for theft and had been sentenced to two years imprisonment. He did not complain to the magistrate because he was afraid the police would assault him again. He denied the content of the remand order (exh P36) as being correct and maintained that he was produced before the magistrate for remand order after six days after he was detained by the police in the lockup.

[40] The defence witness No 2 (DW2) is the younger brother of the and he is familiar with the area in photograph exh P5J which he described as Nanga Tiga. He said Nanga Tiga is a favourite place for hunting wild boars. He said that he used to stay at the farm and often followed the in hunting trips in Nanga Tiga. He said that he had only heard from other people that the area in photograph exh P5J is a common place in which a person could try hitch a ride on passing vehicles. He said Nanga Tiga is a three hour walk from the farm hut and Nanga Tiga is nearer to the farm hut than the gate in photograph exh P5J and it takes 12 hour walk from the farm hut to the gate.

INGREDIENTS OF MURDER

[41] Section 300 of the Penal Code reads as follows:

300 Murder

Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[42] Based on the above, the ingredients of the offence in relation to this case is as follows:

(a) *Ling Sii King is dead*

It was never disputed that PW15, the investigating officer of the case saw the deceased's wife Lee Ching (PW6) identifying the body of the dead person as that of her husband, Ling Sii King during the post mortem conducted by Dr Jamil Dolkadir (PW16).

(b) *Ling Sii King died as a result of injuries sustained*

The evidence of the injuries sustained by the deceased is well documented by the learned judicial commissioner as follows:

> INGREDIENT (b)
>
> This ingredient is largely solicited from the evidence of Dr Jamil Dolkadir (PW16), the pathologist who was requested by the police to conduct a post mortem on the deceased. PW16 said the post mortem was conducted on 2 November 2004 at 3.30pm in the mortuary at Sibu General Hospital. PW16 said he recorded the findings and later on prepared a post mortem report (exh P29) and for convenience the material part is now reproduced:
>
> AUTOPSY FINDING
>
> The body was consistent with 38 year old male of medium built with total body length of about 186cm, clothes in red collar T-shirt, black loge pant and underwear. (The clothing's were given to police). The conjunctiva was pale and dried blood seen at mouth. Part of the skin at chest and abdomen were peeling off due to slight decomposition and handling.
>
> The following were the external injuries seen.
>
> (1) One entry gunshot wound below the left scapula bone, measuring 0.9cm in diameter.
>
> (2) One entry gunshot wound medial to wound number one above, over vertebrae, measuring 0.9cm in diameter.
>
> (3) One entry gunshot wound below the right scapula bone, measuring 0.9cm in diameter.
>
> (4) One entry gunshot wound over the left scapula bone, measuring 0.9cm in diameter.
>
> (5) Three entry gunshot wounds at anterior lower right thigh, measuring about 0.9cm each. All tracts of the wound were going upward. No exit wound seen. Metallic pellet was detected below the skin at the right groin. Metallic pellet was detected below the skin at the right lower chest wall.
>
> No other injuries seen

CAUSE OF DEATH

Bilateral haemothorax due to gunshot wound at the back of the chest penetrating both lungs.

[43] PW16 in his evidence said at least each lung was hit by one bullet. According to PW16, the bullets fired by the shooter hitting the back of the chest penetrating both lungs were necessarily fatal. Thus he said, it amount to an act which is so imminently dangerous that it must in all probability, cause death or injuries as such are sufficient in the ordinary course of nature to cause death. The shotgun (exh P7) when used to fire according to PW16 can cause similar injuries sustained by the deceased. PW16 further said he found no bruises, scratches, swelling, strangulation marks or defensive injuries on the body of the deceased. He also said he found no other probable cause which contributed to the death of the deceased other than the injuries above. The four entry wounds, PW16 said, were on the left back of the deceased with no exit wound. He said the patterns of bullet tracts on the body of the deceased were from the left chest going downward to the right chest as one of the pellets (exh P17A) was extracted on the right lower chest.

[44] Under examination-in-chief, PW16 said the following:

Q: Bullet tract due to the pellets in the body. Can you detect the pattern of the bullet tract on injuries No. 1 to 4?

A: Yes, they are from the left chest of the body going down to the right chest as evidenced the metallic pellet was recovered at the right lower chest. The tract of the pellet was slightly downward from the entry wound to the spot where it was lodged. it was descending slightly. It was less 45 degrees descending. The possible position of the gun show was from the back, left and slightly from higher position. By looking at the wound it is not possible for the attacker to be immediately right behind the deceased because one of the pellets recovered in the right chest with entry wound from the left.

[45] Under cross-examination, PW16 said:

Q: (P5H referred to witness).

Looking at the metal piece which is the lock of the gate, assuming the deceased was unlocking the said gate in standing position, is it possible that a person firing a shotgun from point 'X' to cause wounds No. 1 to 4 (in P4D No 1 to 4)?

A: It is possible from this direction if the angle is less that 45 degrees.

[46] On the injuries No 5 in exh P29, under examination-in-chief, PW16 said:

A As for injury No. 5 (photographs P4F & G), all the tracts and wounds going upward. These injuries were not inflicted simultaneously with injuries No. 1 to 4. Based on these injuries and their tracts, the probable position for the victim would be lying on the ground on his back with face upward. It is probable injuries No. 5 received after injuries No. 1 to 4.

B (P5J referred to witness). If the gunshot came from higher level less than 45 degrees height, towards the direction of the legs of the body lying on the ground with face upward, these injuries No. 5 would have been probable.

C **[47]** From the evidence of PW16, ingredient (b) has been duly proven. The defence did not mount any challenge on the qualification of PW16 to testify as an expert. Considering his qualifications I find that PW16 is an expert witness under the law.

D INGREDIENT (d)

(31) In order to establish this ingredient, the court has to look at the nature of the injuries caused to the deceased and the weapon used in inflicting those injuries.

E **[48]** In *Tan Buck Tee v Public Prosecutor* [1961] MLJ 176 the court had viewed the nature of the injuries sustained by the victim as an indicative of intention where Thomson CJ said:

There was the body with five appalling wounds on it, wounds penetrating to the F heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

G **[49]** In *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 the court said:

It cannot be disputed that intention is a matter of inference. The deliberate use by some mean of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple H matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

I **[50]** In *Public Prosecutor v Sainal Abidin Mading* [1998] 3 CLJ 41, to ascertain the state of mind of the, the court had this to say:

... Meanwhile, as regards intention it is something which is incapable of direct proof. It is also not something that can be seen. It is the state of the mind. Hence, to ascertain it the surrounding circumstances have to be considered including the

nature of wounds inflicted, the number of wounds, the part of victim's body which sustained the injuries and the nature of the weapon used.

[51] Applying those principles to the facts and circumstances of this appeal that a shotgun was used to shoot and puncture the lungs of the deceased, I find that ingredient (d) had been prima facie proven.

PETITION OF APPEAL

[52] The petition of appeal of the appellant will be dealt with here except for para 1 which was abandoned during the appeal stage.

Grounds 1.1 (a) and (b)

The judgment is discussed together:

1.1 The evidence of the sole eye-witness Tong Chin Meng (PW5) should not have been accepted because:

(a) PW5 is a biased witness as he is a friend and colleague of the deceased.

(b) PW5's evidence is not corroborated.

[53] It is the appellant's case that:

The learned judicial commissioner had erred in law and in fact in believing PW5 evidence in toto for he is a biased witness, as his evidence was not corroborated and contradicted. These three issues ie the evidence of the pathologist and the ballistic expert were well reasoned by the learned judicial commissioner when he held at p 379 of the record of appeal that on the averment that the had acted under a reasonable apprehension of danger that death or grievous hurt would be caused to him by the deceased and PW5 the obvious question to ask is were there any advancements made by the deceased and PW5 towards the resulting in the firing a shot at the deceased. PW5 story on the incidence is inherently incredible.

I find the answer is in negative, for how could PW5, who had known the many years did not see the at the crime scene if indeed the story adduced by the can hold water? Why PW5 made his life so difficult for not being able to tell the court the person who fired the shot at the deceased and him was the. PW5 can choose to fabricate the evidence that he indeed saw the firing the shots at him and the deceased. (After all the had confessed in this court that he was the one who did it and that he said it was done in the presence of the PW5). Why PW5 concealed this fact if indeed he saw the at the scene? Why was PW5 not aware of the presence of the and the conversations the deceased allegedly had with the at that material time? After all PW5 can conveniently opt for such recourse more so when the facts depicted by the defence on the right of private defence of person is extremely remote and far from being satisfactory of the requirements of such right at private defence of person.

[54] The pronouncement above can be aptly summarised and it was corroborated from the following evidence:

(a) If at all it is true what the appellant had alleged, why was the information relayed by PW5 to PW2 at about 12.25pm on 25 October 2004 to lodge P3, the police report made no mention that he and the deceased were shot by the appellant.

(b) According to PW5, (at p 16 of the record of appeal) 'I have known him (the appellant) for about 15 years before the incident'.

(c) At p 17 of the record of appeal, PW5 said, 'I knew him personally'.

(d) According to PW15 (at p 79 of the record of appeal), 'I did make investigation at the surrounding of the body. I did not find any incriminating exhibit like parang or samurai sword. I did not find any plank there'.

(e) At the same page, PW15 testified 'I did not find any struggling marks or sign there'.

(f) According to the pathologist, Dr Jamil bin Dolkadir @ Abdul Kadir, PW16 at p 38 of the record of appeal, 'upon my examination of the deceased body externally — I did not find any bruises, scratches, strangulation and defensive injuries'.

Petition: 1.1(c) PW5's evidence on the shooting does not tally with the evidence of both the pathologist Dr Jamil Dolkadir (PW16) and the ballistic expert Chief Inspector Zaidi bin Sait (PW13).

The evidence of the pathologist in itself has created doubt as to whether the two shots were indeed fired from the hilltop position as described by PW5.

(g) The gunshot wounds on the deceased's body do not support the evidence of PW5.

(h) PW5's story on the incidence is inherently incredible.

[55] This is according to the judgment of the learned judicial commissioner at pp 383–387.

[56] In this case, the expert evidence of Sim Hang Tiew, PW7, a government chemist, Chief Inspector Zaidi bin Saif (PW13) an armourer attached to the Armoury Department Police Headquarters Miri, and Dr Jamil Dolkadir, the pathologist expert were never challenged. The defence had also not challenged the procedure in arriving at their decisions.

[57] Similarly in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, Mohamed Azmi J observed that:

> (5) in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step;

(See p 354 — para 12 until para 16 p 357 of the record of appeal).

Petition 2 and 3

[58] That the learned judicial commissioner had erred in law and in fact in rejecting the defence evidence particularly when the prosecution has failed to successfully rebut the same.

[59] The learned judicial commissioner had erred in law and fact in convicting the appellant simply on the basis that he disbelieved the appellant's version of the shooting.

[60] In order for the appellant to invoke private defence or that his defence was provoked by the deceased prompting him to shoot the deceased and PW5, the evidential burden is on him. In *Bala anak Matik v Public Prosecutor* [2006] 3 MLJ 516 at p 517 held that:

> ... the appellant in the present case must satisfy the court on a balance of probabilities ...

[61] Similarly in *Wong Teck Choy v Public Prosecutor* [2005] 4 MLJ 693, the court held at p 696:

> On the facts as established there does not appear to be any dispute that the prosecution had established all the ingredients of the offence of murder. What the appellant did was to say that notwithstanding all the ingredients having been established, he was entitled to be legally excused for the crime because he acted in private defence or alternatively if he acted in excess of that defence, his case came within exception 2 to 5300. *The burden therefore fell on the appellant to establish either defence on a balance of probabilities*.

A (See p 375 para 24 until p 388 para 7).

Petition 6

B **[62]** That the gunshot wounds on the deceased's right leg could not be explained by the prosecution and as such created a serious doubt on PW5 evidence.

C **[63]** At pp 386–388 para 7 of the record of appeal, the learned judicial commissioner held that:

> As regards the second shot, I find, as testified by PW5, it was fired from the same direction as the first shot when the deceased was lying on his back as in photograph P53. This finding is strengthened by the injuries sustained by the deceased on his lower right thigh where bullet tracts of the wounds were going upward with no exit wound.

D

[64] The above finding of fact and law of the learned judicial commissioner which in my view, accurately interpreted the cause and effect of the crime committed by the appellant. The findings of fact are consistent with the evidence before the court. The findings of law are correct and there is no misdirection by the learned judicial commissioner on both findings of fact and law.

E

F CONCLUSION

[65] Based on the above, I find no reason to disturb the findings of fact and law of the learned judicial commissioner. The appeal is dismissed and the order of the High Court is affirmed.

G *Appeal dismissed.*

Reported by Kohila Nesan

H

I